

IN THE COURT OF APPEALS 03/12/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-00720 COA

JOHNNY LEE DORTCH

APPELLANT

v.

**FRITO LAY, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES GRAVES

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

LAURA HENDERSON

BARRY W. GILMER

ATTORNEYS FOR APPELLEES:

KEITH R. RAULSTON

J. RANDALL PATTERSON

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: ORDER OF COMMISSION DENYING BENEFITS AFFIRMED

BEFORE FRAISER, C.J., BARBER, AND DIAZ, JJ.

FRAISER, C.J., FOR THE COURT:

Johnny Lee Dortch (Dortch) sought workers' compensation benefits alleging he received a compensable injury while on the job. The Mississippi Workers' Compensation Commission found that Dortch had failed to establish the requisite connection between his employment and his injury. Consistent therewith, the commission denied benefits. The Hinds County Circuit Court affirmed the commission's decision. Dortch presents two issues on appeal:

I. THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION'S FINDING THAT THE EVIDENCE PRESENTED FAILED TO ESTABLISH AN UNTOWARD EVENT OR OCCURRENCE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

II. THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION'S FINDING THAT THE MEDICAL EVIDENCE FAILED TO ESTABLISH A CLEAR AND CONVINCING CAUSAL RELATION BETWEEN THE CLAIMANT'S INJURY AND HIS DISABLING MENTAL CONDITION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

These issues are without merit. Under our limited appellate scope of review, we affirm.

FACTS

Dortch filed his petition to controvert on September 29, 1987, claiming that he suffered "mental anxiety, depression, agitation and paranoia" caused by reassignment to a job for which he was not adequately trained. Dortch began working at the Frito Lay plant in Jackson in November 1978. He began as a temporary employee in the capacity of cheese mixer, a general utility job. Shortly thereafter, Dortch bid on a sanitation job and became a permanent employee. One year later, Dortch bid on and received the general utility position of corn cooker. After holding that position for a year, Dortch bid on and received the job of packing machine operator (PMO). With that position came an increase in responsibility and pay. However, one year later, due to a short term layoff, Dortch was "bumped back" to a general utility position. In 1986, Dortch was "bumped back" to an entry-level position of packer due to a plant-wide layoff. Dortch's reassignment was controlled by a collective bargaining agreement between the union and his employer. Section 9(C) of the collective bargaining agreement explains the "bumping" procedure:

Short-term layoffs that extend beyond five consecutive work days or layoffs that at their start are expected to last longer than five consecutive days will be defined as long-term. The bumping procedure for long-term layoffs shall be as follows: (A) The employees affected will bump the least senior employees and the classification on that shift. (B) The employees affected by the above will bump the least senior employees in the classification plant wide. (C) The least senior employees thus affected may then exercise a bump in a similar manner into his just prior held classification, plant wide, or if his seniority will not allow it, into an entry-level classification plant wide.

During the hearing before the administrative law judge (ALJ) of the Mississippi Workers' Compensation Commission (MWCC), Mr. Steven Szabo, former personnel administrator of Frito Lay, testified exactly how the bumping procedure affected Dortch's reassignment. The first step in Dortch's reassignment involved establishing whether there existed a job on Dortch's shift within his job classification. None existed. Because Dortch was not able to bump anyone in the first step, the next step entailed looking at the available jobs in Dortch's classification on one of the other shifts. Dortch could not bump into his classification on either of these two steps, so the third step required management to look at Dortch's prior held classification of PMO to see if he could bump anyone in that classification. Even though Dortch had seniority over some of the existing PMO's, he was nevertheless unable to bump anyone because he lacked the necessary training required to operate the new computerized packaging machines. This led to the last step of the collective bargaining agreement which placed Dortch into the entry level position of packer.

Dortch testified that because of his size (six feet four inches, 245 pounds), he was unable to master the task of packing. He was shown a fifteen minute tape on how to pack and was to receive the rest of his training on the job. However, according to Dortch, the machine operators turned the machine up to seventy-two bags per minute making it impossible for him to keep up. As a result, testified Dortch, the potato chips flew all over the floor and his superiors and co-workers laughed at him. Dortch felt humiliated, went home to his wife, and broke into tears. He began suffering depression and frustration, as well as sleeplessness and suicidal thoughts. He was referred to Dr. Donald Guild who treated him until he could no longer pay his medical bills. Dortch took a six month leave of absence from Frito Lay and was finally terminated in May 1987 because he violated the leave agreement. Dortch never filed the customary grievance with Frito Lay prerequisite to claiming erroneous reassignment. His petition for workers' compensation benefits claimed that his reassignment to an entry-level position caused severe mental suffering and resulting disability. Subsequent to a full hearing, the ALJ denied and dismissed Dortch's claim. The ALJ's order and opinion denying workers' compensation relates the following:

2. The evidence presented does not establish an "untoward event or occurrence";

3. The medical evidence fails to establish a clear and convincing causal relation between claimant's alleged injury and his disabling mental condition.

Dr. Donald Guild testified he first saw claimant on January 15, 1987 on referral by claimant's attorney. At that time claimant reported he had been off work since December, 1986. Dr. Guild testified he saw claimant periodically between January and November, 1987 when he referred claimant to a Mental Health Center. Dr. Guild also saw claimant once in May, 1989 and once in June, 1989.

Dr. Guild testified claimant did improve somewhat during treatment but claimant remains temporarily and totally disabled due to depression and claimant is in need of

hospitalization. Dr. Guild testified he encouraged claimant to attempt to find employment and testified employment would be both indicated and therapeutic. However, Dr. Guild stated claimant's condition in all probability makes claimant unable to work. Dr. Guild testified claimant had reported in February, 1987 that he served on jury duty and that he "handled that well." Dr. Guild testified the ability to serve as a juror demonstrates substantial coping mechanisms and indicates claimant's condition is not completely debilitating. Dr. Guild testified [he] has not consulted with or obtained records from any other physicians who have seen claimant. Dr. Guild did not have any specific information about claimant's history of peptic ulcer disease.

Dr. Robert Ritter, psychiatrist, examined claimant on request by defendants on July 11, 1989 and referred claimant for psychological testing performed by Dr. Billy Fox. Dr. Ritter diagnosed delusional (paranoid) disorder-persecutory type, and dysthymia and testified claimant's psychiatric problems were not caused by any event associated with his employment. He testified claimant is in need of further psychiatric care.

In order to recover workers' compensation benefits for disability resulting from an alleged mental condition, claimant must show by clear and convincing evidence that there exists a causal relation between the alleged condition and his employment. Claimant must also show his condition resulted from an "untoward event or occurrence" at work. Having carefully considered the evidence in its entirety, I find claimant has failed to establish an "untoward event or occurrence" arising out of his employment environment. In the everyday work force, layoffs, transfers and job reassignments are unfortunate, but not unusual events.

The ALJ's findings and opinion were accepted and adopted by the MWCC. On appeal, the Hinds County Circuit Court affirmed the MWCC's order. This appeal ensued.

Appellate review of compensation claims is a narrow one. It is well settled that "[t]he Commission is the ultimate fact-finder." *Hardin's Bakeries v. Dependent of Harrell*, 566 So. 2d 1261, 1264 (Miss. 1990). "Accordingly, the Commission may accept or reject an administrative judge's findings." *Id.* In the case *sub judice*, the MWCC accepted and adopted the findings of the ALJ after thoroughly studying the record and applicable law. Our standard of review is set forth in *Delta CMI v. Speck*:

Under settled precedent, courts may not hear evidence in compensation cases. Rather, their scope of review is limited to a determination of whether or not the decision of the commission is supported by the substantial evidence. If so, the decision of the commission should be upheld. The circuit courts act as intermediate courts of appeal. The Supreme Court, as the circuit courts, acts as a court of review and is prohibited from hearing evidence or otherwise evaluating evidence and determining facts; . . . "[W]hile appeals to the Supreme Court are technically from the decision of the Circuit Court, the decision of the commission is that which is actually under review for all practical purposes."

As stated, the substantial evidence rule serves as the basis for appellate review of the commission's order. Indeed, the substantial evidence rule in workers' compensation cases is well established in our law. Substantial evidence, though not easily defined, means something more than a "mere scintilla" of evidence, and that it does not rise to the level of

"a preponderance of the evidence." It may be said that it "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred."

Delta CMI v. Speck, 586 So. 2d 768, 772-73 (Miss. 1991) (citations omitted).

"This Court will reverse an order of the Workers' Compensation Commission only where such order is clearly erroneous and contrary to the overwhelming weight of the evidence." *Mitchell Buick, Pontiac & Equip. Co. v. Cash*, 592 So. 2d 978, 980 (Miss. 1991) (citations omitted). Therefore, we must examine the record and be satisfied that substantial evidence existed upon which the commission could base its decision.

According to *Smith & Sanders, Inc. v. Peery*, a claimant seeking worker's compensation benefits for mental injury unaccompanied by physical trauma, must prove "such injury can be directly linked to some 'untoward event, unusual occurrence, accident or injury incident to . . . employment.'" *Smith & Sanders, Inc. v. Peery*, 473 So. 2d 423, 426 (Miss. 1985) (quoting *Johnson v. Gulfport Laundry & Cleaning Co.*, 249 Miss. 11, 18, 162 So. 2d 859, 862 (1964)). In *Peery*, the Mississippi Supreme Court reversed the holding of the circuit court, thereby denying benefits to Peery who suffered a nervous breakdown after being laid off from work. *Peery*, 473 So. 2d at 426. The court stated:

In an economic system such as ours, layoffs are unfortunate but not unusual events. They cannot in our opinion be characterized as untoward or unusual occurrences. Were compensation proper for Peery, benefits could be held to extend to any employee who suffers depression or anxiety upon being rightfully discharged. We do not think this was the legislative purpose of the Worker[s'] Compensation Act, which provides for neither unemployment compensation nor general health insurance, but for compensation for injuries arising out of and in the course of employment.

Id. "We note our decision comports with the rule announced in other jurisdictions that [for] a mental condition to be compensable [it] must have been caused by something more than the ordinary incidents of employment." *Id.* (citations omitted); *see also Bates v. Countrybrook Living Ctr.*, 609 So. 2d 1247, 1248 (Miss. 1992) ("A mental injury, unaccompanied by physical trauma, must be shown to have been caused by something more than the ordinary incidents of employment.").

Dortch puts misplaced reliance on the case of *Brown & Root Construction Co. v. Duckworth*, 475 So. 2d 813, 815 (Miss. 1985). The Mississippi Supreme Court allowed workers' compensation benefits in that particular case where the claimant suffered mental injury absent physical trauma. *Id.* Duckworth was not merely reassigned or denied promotion at his place of work, but was deliberately misled and betrayed by his superiors. *Id.* Such was not the case with Dortch. Testimony revealed that there was a collective bargaining agreement in place to cover plant lay offs. Steven Szabo testified

that the proper procedures were followed in Dortch's reassignment. Dortch's co-worker, Irvin Bradley, a member of the union contract bargaining committee, testified that there was a grievance procedure in place for employees who felt they had been improperly reassigned. Bradley testified that Dortch should have followed that procedure if he felt that he had been treated unfairly by Frito Lay. Although medical testimony was conflicting, the "Commission is the trier of facts as well as the judge of the credibility of the witnesses." *Miller Transp, Inc. v. Guthrie*, 554 So. 2d 917, 918 (Miss. 1989); *see also Kersh v. Greenville Sheet Metal Works*, 192 So. 2d 266, 269 (Miss. 1966) ("However, where the medical evidence in a heart case is conflicting, the court will affirm the commission whether the award is for or against the claimant."). The MWCC order finding Dortch had failed to prove by clear and convincing evidence that (a) his mental condition was the result of an untoward event or occurrence at work and (b) that a causal connection existed between his alleged injury and his employment, is undergirded with substantial evidence. Under our limited scope of review, we have no alternative but to affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY AFFIRMING THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION'S DENIAL OF BENEFITS TO CLAIMANT IS AFFIRMED. COSTS ARE TAXED TO APPELLANT.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.